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MICHAEL RODAK,

NO. 75-1254

In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL W. WILLIAMS and
ROBERT O. WILLIAMS, on behalf
of themselves and all others
similarly situated,
Petitioners

v.

AMERICAN AIRLINES, INC. and
TRANS WORLD AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BLEED THROUGH

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL W. WILLIAMS and ROBERT O. WILLIAMS, on behalf of themselves and all others similarly situated, Petitioners, pray to this Honorable Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit which was final in this case on December 8, 1975.

OPINIONS BELOW

There is no published opinion by the United States District Court, Northern District of Illinois, Eastern Division. Petitioners received a copy of a docket sheet dated December 10, 1973, with the following notation written on it: "On Court's own motion order cause dismissed with prejudice and without costs on the ground that cause is moot." Judge Hubert L. Will was the presiding judge.

The Court of Appeals, on December 8, 1975, handed down an opinion, not yet reported, affirming the trial court's judgment. That opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals became final on December 9, 1975. Federal jurisdiction was originally invoked under 28 U.S.C. 1337 and the Federal Aviation Act of 1958, 49 U.S.C. 1301, et seq.

QUESTIONS PRESENTED

This case presents the issue of whether an

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admitted and adjudged violation of federal law requiring notice and hearing preliminary to a Board established rate order, renders the resulting order void or merely voidable.

Also presented is the question of whether an administrative determination of reasonableness of fares can moot or effectively moot a question of law presented to a court by litigants in an independent common law action preserved to them by federal statute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Questions are raised in regard to the constitutional requirement of Procedural Due Process. Amendment 5, United States Constitution.

49 U.S.C. 1343(d) and (e) and 49 U.S.C. 1506, provisions of the Federal Aviation Act, also form a basis for this litigation.

STATEMENT OF THE CASE

The record in this case consists of the record on appeal and a transcript of proceedings. The

record and transcript are now on file with the Clerk of the United States Court of Appeals for the Seventh Circuit.

From October 1, 1969 to October 15, 1970, the air carriers were collecting fares from the air-travelling public, including petitioners, pursuant to an order of the Civil Aeronautics Board, held to be unlawful in Moss v. C.A.B., 430 F.2d 891 (1970). Statutory requirements of notice and hearing set out in 49 U.S.C. 1343 (d) and (e) were admittedly not complied with. On July 21, 1970, Petitioners filed a complaint in the United States District Court for the District of Columbia for recovery of Money Had and Received against two air carriers to recover monies paid in excess of the valid existing rate. The complaint was brought as a class action. On August 11, 1970, Petitioners moved for a summary judgment against the air carriers on the issue of liability.

Petitioners' cause was subsequently consolidated with other similar actions in the United States District Court, Northern District of

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Illinois, Eastern Division by the Judicial Panel on Multidistrict Litigation.

Motions relating to the class action aspects of the case were filed in that court by plaintiffs in the consolidated action but were not ruled upon by the court.

On December 10, 1973, the court dismissed Petitioners' case with prejudice on the grounds that the cause is moot. There were numerous "reports on status" and "status calls" in the trial court. A trial, however was never held and no ruling on Petitioners', nor on the air carriers', motions for summary judgment were made by the trial court.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS, IN EFFECT, DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In Moss v. C.A.B., 430 F.2d 891 (1970), there was a holding that the CAB had determined rates "within the meaning of Section 1002(d) and (e) of

the Federal Aviation Act, 49 U.S.C., sec. 1482 (d) and (e) without complying with the requirements of those sections that this be done after notice and hearing." (As summarized in Moss II--Moss v. C.A.B., 521 F.2d 298, 301).

It has been specifically held that the denial of a hearing granted by statute is a denial of due process of law. The Supreme Court did not invalidate that tenet in Storer Broadcasting v. U.S., 220 F.2d 204, rev'd on other grds. 351 U.S. 192.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in nature are void if a hearing was denied." ICC v. Louisville & Nashville Ry. Co., 227 U.S. 88, 91.

In United Gas Pipe Line Co. v. Mobile Gas Service Corp., et al, 350 U.S. 332, there was noncompliance with notice requirements in section 4(d) of the Natural Gas Act. It resulted in the new schedule calling for increased rates being declared a nullity insofar as it purported to

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change the then existing lawful rate. (The Supreme Court unanimously held that any amounts paid in excess of the existing lawful rate were unlawfully collected and the natural gas company was obligated to make restitution of the excess payments.) 350 U.S. 347.

Throughout this present litigation the carriers and the Board have contended that the illegal rates were voidable and that questions of reasonableness and equity should be considered in an action for restitution. The Court of Appeals so held. (App.A. p.17) They all rely almost totally upon Atlantic Coast Line v. Florida, 295 U.S. 301 (1935), a case where there was an absence of specific findings supporting an ICC order. Since the requirement for sufficient findings has been held by this Supreme Court to be not based on due process in Pacific States Box and Basket Co. v. White, 296 U.S. 176, Petitioners have always denied Atlantic Coast Line's relevance to the present case.

The effect of the U.S. Court of Appeals' ruling below is to hold that administrative orders issued

after violation of statutory provision for procedural due process are merely voidable and not void and that violations of due process safeguards are tantamount to mere slips or minor procedural defects. Thankfully, there are few cases where government agencies--with or without members of their regulated industries--violate due process by ignoring statutory requirements of notice and hearing. When it has happened, resulting orders have always been held void.

In that respect, the decision of the Court of Appeals below is in conflict with every applicable decision of the United States Supreme Court.

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN ALLOWING AN ADMINISTRATIVE FINDING TO EFFECTIVELY MOOT PLAINTIFF'S STATUTORILY PRESERVED COMMON LAW ACTION BEFORE THE COURTS, AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S SUPERVISION.

The trial court and the United States Court of

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Appeals for the Seventh Circuit erred in holding that an administrative holding by the Civil Aeronautics Board could moot or effectively moot a question of law before the courts and deny Petitioners the right to proceed with a common law action (money had and received) preserved to them by 49 U.S.C. 1506.

The ostensible purpose of the CAB hearing was to determine the "reasonableness vel non" of the air tariffs established by the adjudged invalid order of October 1, 1969. The Petitioners have consistently pointed out the futility of those proceedings since the Board is without power to make restitution and since the Board acted with the air carriers to violate the provisions of the Federal Aviation Act calling for notice and hearing. (Moss v. C.A.B., 430 F.2d 891 (1970), at pp. 893-5).

This entire case turns upon one question of law. It was presented for review by the Court of Appeals thusly: "Whether an admitted and adjudged non-compliance with the notice and hearing requirements

of the Federal Aviation Act rendered a resulting invalid administrative order void or merely voidable."

The CAB is powerless to decide this type of pure question of law except, perhaps, by implication. If the order is void, all findings related to reasonableness and equity are meaningless. If it is voidable, such findings would be controlling. No court, administrative board, nor mortal, can breathe life into something that is void.

The Petitioners have a constitutionally protected right not to have their cause of action taken from them by a narrow administrative adjudication to which they were not a party, which may be irrelevant, and which did not and could not treat the question of law they raised before courts of competent jurisdiction.

CONCLUSION

The record below is one of possible irrelevance, confusion and incompleteness. The end result, however, is a Court of Appeals holding which can have a major, if not revolutionary, impact upon

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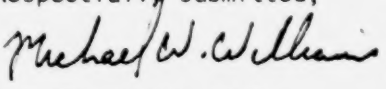
certain areas of constitutional and administrative law. If, all at once, procedural due process violations are to be treated as mere procedural defects, the Supreme Court should speak to that point. If, all at once, administrative agencies can reach out and "moot" pure questions of law before the courts in independent common law actions, the Supreme Court should speak to that point also.

This case strongly calls out for oversight and review by this Supreme Court.

For those reasons, Petitioners respectfully submit that their petition for writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Petition for Certiorari were served on each of the respondents by sending said copies air mail, postage prepaid, to the following persons and addresses:

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in conformity with Rules 21 and 33 of the United States Supreme Court, this 3rd day of March, 1976.

Michael W. Williams

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APPENDIX A

OPINION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

NOS. 74-1108, 74-1146 and 74-1246

Keith Roberts, et al.,
Plaintiffs-Appellants,
v.
American Airlines, Inc., et al
Defendants-Appellees.

Michael Williams, et al.,
Plaintiffs-Appellants,
v.
American Airlines, Inc., et al
Defendants-Appellees.

Alan Weidberg, et al.,
Plaintiffs-Appellants,
v.
American Airlines, Inc., et al.,
Defendants-Appellees.

Air Travelers Association, et al.,
Plaintiffs-Appellants,
v.
Air West, Inc., et al.,
Defendants-Appellees.

Appeals from the United States District Court for
the
Northern District of Illinois
Eastern Division
Nos. 71 C 783, 71 C 711, 70 C 1879, 71 C 785
HUBERT L. WILL, JUDGE

Argued September 8, 1975
Decided December 8, 1975

Before CASTLE, Senior Circuit Judge, SWYGERT and PELL, Circuit Judges.

PELL, Circuit Judge. These four appeals, consolidated in this court for hearing and disposition, are brought by some of the plaintiffs following an adverse judgment in the district court.

In August, 1969, twenty of the principal domestic air carriers filed tariffs which increased domestic air passenger fares. On September 12, 1969, the Civil Aeronautics Board (CAB) suspended these tariffs under 49 U.S.C. sec. 1482(g) (1964), but announced that it would accept, without suspension, tariffs which utilized a proposed fare formula. The carriers then withdrew their suspended tariffs and filed new tariffs in accordance with the Board's proposed fare formula. The carrier-filed tariffs were allowed to stand without suspension or investigation.

Thirty-two interested Congressmen then petitioned for review alleging that the CAB, by excluding the public from ex parte meetings with representatives of the air carriers and by holding a pro forma public hearing, had unlawfully approved

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the increased fare structure. In Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), (Moss I), the Court of Appeals held that the September 12 order was invalid and the tariffs filed by the carriers based thereon were unlawful. Subsequently, a number of class actions were filed on behalf of all or a portion of the passengers on domestic airlines who paid the increased fares, seeking recovery of an amount measured by the alleged illegal increase. The Judicial Panel on Multidistrict Litigation ordered that all of the class actions be transferred to the United States District Court for the Northern District of Illinois for coordinated or consolidated pretrial proceedings under 28 U.S.C. sec. 1407. In re Air Fare Litigation, 322 F.Supp. 1013 (J.P.M.L. 1971). Following transfer, the defendants moved to stay the proceedings pending completion of a CAB investigation entitled "Reasonableness of Passenger Fares charged by Domestic Trunkline and Local Service Carriers from October 1, 1969, through October 12, 1970." In Weidberg v. American Airlines, Inc., 336 F.Supp. 407 (N.D. Ill. 1972), the court granted the stay motion and ordered that all proceedings in the litigation be held in abeyance until further order. On June 1, 1972, this court denied a petition for mandamus seeking to upset the stay order.

No further action, except routine status reports, took place in the suits for approximately eighteen months following this court's denial of the mandamus petition. Meanwhile, the CAB completed its investigation of the reasonableness of passenger fares and, on July 11, 1973, issued Order No. 73-7-39. This order denied to air passengers recovery of any part of the unlawful fares on the grounds that the fares in question were not unjust or unreasonable, and, in any case, resulted in no unjust enrichment of the airlines. After the publication of the CAB order, the district court indicated, during the regular status reports, that he was disposed to grant the defendants' motion to dismiss. At a subsequent status

call, the district court judge expressed his view that the seven damage actions were moot. The district court judge observed that absolutely nothing was happening in the case and had not for a year, and he suggested that he would dismiss the cases, subject to reinstatement should the District of Columbia Court of Appeals reverse the CAB finding of just and reasonable rates.

On December 20, 1973, the district court, on its own motion, dismissed the seven actions with prejudice and without costs on the ground that the causes were moot. Four of the civil actions which were appealed are encompassed in these consolidated appeals;[1] the named plaintiffs in the other three actions did not seek appellate review. The appellants seek to reverse the judgment of dismissal.

The procedural history of these cases is inextricably related to other administrative and judicial proceedings. On July 16, 1973, Congressman John E. Moss and some twenty-four colleagues petitioned for direct review of CAB Order No. 73-7-39. It was they who had instituted the CAB proceedings which culminated in that order, just as it was they (or a similar group) who secured the Moss I ruling that invalidated the September 12, 1969, order. Keith Roberts, a named plaintiff in one of the district court suits and appellant in No. 74-1108, also filed a petition (No. 73-1790) seeking review of the 1973 order.

He had successfully sought to intervene before the CAB in the proceedings which produced the Board's final decision in Order No. 73-7-39, and he was also allowed to intervene in the Moss review petition (No. 73-1772).

At the time of oral argument of the present appeals, there had been no decision in the related review petitions. Subsequent to oral argument, the D.C. Circuit in Moss v. CAB, 521 F.2d 298

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(D.C. Cir. 1975), (Moss II), affirmed the challenged order. That court faced the question as to whether there was to be a recovery of any part of the unlawful fares, and it concluded that the decisional principles used by the CAB in denying such relief were determunative and correctly applied. Not only did the court expressly hold that the petitioners (Moss and Roberts) had no right to recover all amounts in excess of the last lawfully established rates, but it also confronted, and rejected, the alternative claim that recovery of an amount measured by the difference between the charged fares and "reasonable" fares was available to the Moss petitioners or to Roberts.

The question originally raised in these consolidated appeals was whether passengers are entitled to recover damages or secure restitution of monies paid under illegal air passenger tariffs which the Civil Aeronautics Board has found not to be unjust or unreasonable. As originally argued, our primary task was to explicate the precise legal meaning of the Moss I holding that the September 12, 1969, CAB order was invalid and that the passenger tariffs were illegal. 430 F.2d at 902. The opposing parties found different meanings in the opinion, and they directed argument to the question whether the 1969 order was void or voidable. We think that Moss II clearly and correctly explicates the earlier decision and establishes that the CAB order attached in Moss I was voidable rather than void.

Accordingly, we need not undertake a lengthy analysis of the substantive questions of law raised in these appeals. However, Moss II does not effectively resolve all of the vexing questions raised here, and we deem it necessary to address ourselves to some of the remaining problems.

I. Res Judicata and Mootness

A. Res Judicata

At the January 14, 1974, hearing on the motion to reconsider the orders of dismissal, the district judge focused directly on the impact on the present cases of an affirmance of CAB Order No. 73-7-39:

THE COURT: * * *

"My logic is, in fact, the dismissal stands because the District Court of Appeals, District of Columbia affirms that the fares were reasonable and fair, that that is res judicata, and it takes care of the issue once and for all, or, at least it is estoppel by judgment if not res judicata. There may be some technical differences between the parties.

* * *

"However, there is no damage cause if these improperly adopted fares are subsequently determined to be fair and reasonable, then I don't know what there is left to litigate, except to give it to some law school moot court, or put it on an examination; but, there is nothing more useless than litigating issues from which there can be no recovery in the nature of damages or other relief.

"So, the fact that the FAA (sic) has now found these fares to be reasonable, and that is now on appeal, seems to me means that these cases will all be moot. They are moot <u>at this point</u> unless that determination is reversed." (Emphasis added.)

Accordingly, the district court dismissed the cases as moot, with the proviso that it would reinstate the causes should the challenged CAB order later be reversed.

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The above quotation from the transcript puts flesh on the bare bones of the formal minute order. The latter statement embodies only a one-sentence formulation, grounding the dismissal on "mootness." Our own reading of the record convinces us that the district court concluded that all of the plaintiffs' claims for restitution were barred by the CAB determination that the air passengers were not injured by paying the fares in question. The lower court relied on the fundamental legal premise that mere illegality which causes no injury is not ordinarily compensable. Thus, the district judge disposed of the cases upon the basis that the CAB finding that the challenged fares were not unjust and unreasonable necessarily implied that the plaintiffs had not been injured and the defendants had not been unjustly enriched.

At the time of the dismissal order, of course, the challenged CAB order was the subject of review proceedings. As we have previously noted, appellant Keith Roberts was a party to the review petitions. Similarly, some fourteen airlines, the defendants-appellees in Appeal No. 74-1108, were allowed to intervene in the review process. Since there is identity of parties and issues, the principles of res judicata and collateral estoppel bar the restitution claims of Roberts.

Under 28 U.S.C. sec. 2106, this court may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review. Accordingly, we modify the dismissal order entered in Appeal No. 74-1108 so as to represent a Rule 56(b) summary judgment in favor of the defendants on all counts in the Roberts complaint, on the ground that Moss II establishes, as a matter of law, that Roberts has no right to recover from the air carriers. As so modified, the judgment is affirmed.

The other plaintiffs-appellants stand in a somewhat different technical position. The record

indicates, and the Moss II opinion confirms, that they were not parties to the CAB proceedings which led to Order No. 73-7-39 and that they did not successfully intervene in the review petitions adjudicated in the Moss II decision. Accordingly, there is no strict res judicata effect of that decision regarding the claims of Weidberg, Williams, and the Air Travelers Association.

B. Mootness

In most litigation, the continuing existence of a dispute is not questioned, and the court can readily find that there exists a subject matter on which the court's judgment can operate to make a substantive determination on the merits. See Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373 (1974). Courts have traditionally declined to hear cases in which neither party stands to gain or lose by a decision on the theory that the state should not be burdened with the expense of trying such controversies. Id. at 374. The doctrine that courts will not hear moot cases prevents the useless expenditure of judicial resources. Id. at 375-76. Indeed, it has been stated that "(i)n the cases where issues have become moot as a result of judicial decision, or otherwise, the courts unquestionably have the authority, and it often becomes their duty, to dismiss cases sua sponte and without any motion to dismiss being made." Myers v. Polk Miller Products Corp., 201 F.2d 373, 376 (C.C.P.A. 1953).

The transcript of the January 14, 1974, hearing, part of which is set forth above, establishes that the district judge used the word "moot" to mean that the plaintiffs had suffered no injury by paying the fares in question and could not recover any monetary damages. The ambiguous usage of the term resulted in appellate briefs setting forth numerous cases exploring this subtle jurisprudential concept. We need not determine whether the district judge was correct in determining that the

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causes were moot as of the date of his dismissal order, for the case law establishes an independent and adequate ground for affirmance.

In Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970), cert denied, 400 U.S. 828, this court had before it a judgment dismissing the complaint with prejudice on the merits where problems of motion practice raised important procedural issues. The Schy decision held that a motion to dismiss based upon a lack of damages may properly be treated as a motion to dismiss under rule 12(b) (6). Id. at 1115. The court quoted approvingly from Premier Malt Products Co. v. Kasser, 23 F.2d 98, 99 (E.D.Pa.1927), where the court observed:

> "There must be both the injuria and the damnum to give a legal cause of action, and this remains true notwithstanding the legal fiction of nominal damages. Indeed, this truth made the legal fiction logically necessary."

Accord, Citrin v. Greater New York Industries, 79 F.Supp. 692, 694-95 (S.D.N.Y. 1948); Package Closure Corporation v. Sealright Co., 4 F.R.D. 114, 116 (S.D.N.Y. 1943). Moreover, Schy, supra, recognized that a motion to dismiss made after the filing of an answer not only served the same function as a motion for judgment on the pleadings and might be regarded as one, id. at 1115, but could be treated as a motion for summary judgment under Rule 12(c). Id. at 1116.

In this case, the defendant air carriers moved for dismissal on the grounds that plaintiffs had failed to state a claim for which relief could be granted. Moreover, shortly after entry of CAB Order No. 73-7-39, the defendants filed a motion for summary judgment dismissing the consolidated actions on the ground that the CAB decision precluded recovery by the plaintiffs. The air carriers insisted that there was no genuine issue

as to any material fact and that they were entitled to the requested summary judgment of dismissal as a matter of law.[2] The plaintiffs responded to this motion by arguing that the pending appeal in Docket No. 73-1772 (the Moss review petition) made the summary judgment request premature, by adopting all their filed legal memoranda as an answering memorandum, and by citing additional legal authority in opposition to the motion. The plaintiffs placed great reliance on the pendency of the appeal, and they argued that no findings or conclusions in Order No. 73-7-39 could possibly be considered final. Significantly, however, they made no direct argument that there was a genuine issue as to any material fact.

We think that, in substance, if not in form, the district court granted the defendants' motion for summary judgment. Under the authority of Schy, we treat the challenged dismissal order as a Rule 56(b) summary judgment on all counts in the complaint in favor of the defendants. As so modified the judgment is affirmed.

II. Non-Consideration of the Class Action Question

Another major problem still remaining in this appeal stems from the failure of the district court to consider or determine whether the suits should be maintained as a class action. Although inadequate compliance with F.R.Civ.P. 23(c)(1) has emerged in a number of recent appeals taken to this court, see, e.g., Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975); Jimenez v. Weinberger, ...F.2d .....No. 75-1046 (7th Cir. September 12, 1975), neither side in the present case has briefed or argued the legal effect of the district court's failure to make the class determination in the instant cases.

This court has recently determined that, in an appeal from a decision on the merits made without

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the prior class determination required by Rule 23(c)(1), the reviewing court will treat the case as one brought by the named plaintiff only and not as a class action. Case & Co., Inc. v. Board of Trade of City of Chicago, 523 F.2d 355, 360, (7th Cir. 1975). Accordingly, we treat these cases as brought solely on behalf of the named plaintiffs.

Under established principles, the Rule 56(b) summary judgment against the named plaintiffs will not protect the defendant air carriers against other members of the class under the doctrine of res judicata, see Katz v. Carte Blanche Corp., 496 F.2d 747, 758-759 (3d Cir. 1974), cert. denied, 419 U.S. 885. However, the defendants, by moving for summary judgment prior to the class determination and the sending out of class notice, assumed risk that a judgment in their favor would not protect them from subsequent suits by other potential class members. See Haas v. Pittsburgh National Bank, 381 F.Supp. 801, 806 (W.D.Pa. 1974), rev'd on other grounds, ...F.2d....., No. 74-2190 (3d Cir. September 25, 1975). Since the defendants sought summary judgment on the ground that the named plaintiffs could not recover monetary damages, they have the not inconsequential protection of stare decisis regarding identical claims of unnamed plaintiffs. See Katz, supra at 759; see also Haas, supra at 806. Although the air carriers have never expressly stated that they would be content to rest on the protection of stare decisis rather than upon res judicata, we think that the circumstances of this case authorize the court to infer such a concession.

Moreover, our recent decisions leave room for no other approach. In Peritz, the district judge severed a central liability issue from the class action determination issue and deferred resolution of the latter until after a jury determined whether the defendant's loan form clearly and conspicuously disclosed that credit life and/or dis-

ability insurance was not required for obtaining a loan from Liberty Loan Corporation. After the return of a special verdict establishing liability, the judge determined that a class action could be maintained on the claims remaining in issue. This court ruled that the language of Rule 23(c) clearly requires class certification prior to a determination on the merits. (emphasis in original). The court was constrained to hold that certification of the class was delayed beyond the permissible period allowed by the rule.

In Jiminez, the trial court certified the case as a class action after a decision on the merits. The real problem lurking in the case was the possibility of one-way intervention whereby a potential plaintiff could await a resolution of the merits before deciding whether or not to join the suit. This court in the recent Jiminez opinion indicated that, in some cases, the final certification need not be made until the moment the merits are decided. (emphasis in original). Since the class allegations in that case met the requirements of subdivision (b)(2) of Rule 23 rather than subdivision (b)(3), the court thought it fair to infer that the timing of certification in the former kind of class suit could differ from the timing required in the latter. Because the allegations met (b)(2) requirements, the court was able to avoid concluding that non-certification required automatic reversal. Significantly, however, Jiminez plainly stated that a reversal would almost certainly have been required in the class action had it been maintained under subdivision (b)(3).

In the instant appeals, the class allegations fall under subdivision (b)(3). Moreover, at least one of the named plaintiffs formally moved for certification of the suit as a class action. We conclude that under the mandatory language of Rule 23(c)(1) and our prior decisions, the district court could not, should we remand the

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present actions for entry of Rule 56(b) summary judgments, proceed to make a delayed class certification. Thus, there is no way under the federal rules of procedure for the defendant air carriers to secure the protection of res judicata. They must rest content with the stare decisis protection. We cannot countenance a patent violation of Rule 23.

We have examined the other contentions raised by appellants, and we find them meritless. Accordingly, we modify the orders of dismissal, and, treating them as summary judgment that the named, individual plaintiffs are barred from securing restitution from the defendant air carriers, we affirm.

Affirmed as Modified.

Footnotes

[1]No separate docket number has been assigned in the appeal Air Travelers Association, et al v. Air West, Inc., et al., which was docketed below as C-785. The February 12, 1974, notice of appeal filed in Alan Weidberg, et al v. American Airlines, Inc., et al., Appeal No. 74-1246, clearly stated that Air Travelers Association, et al., was appealing from the January 14, 1974, final judgment in these actions.

[2]The defendants-appellees relied on the same decisional principles found determinative by the CAB and, later, by the Moss II court. We have made an independent analysis of the precedents, and we agree with the Moss II decision. The allegations in the various complaints filed by the plaintiffs-appellants differ somewhat in language, but the general thrust of the language aims at a common law declaration for money had and received. We accept as conclusive the CAB finding, now affirmed by the Moss II court, that the air carriers were not unjustly enriched by collecting the fares in question. Under these circumstances, Atlantic Coast Line R.R. v. Florida, 295 U.S. 301 (1935), and United States v. Morgan, 307 U.S. 183 (1939), preclude a restitutionary remedy. If Schy and its analysis were not proper authority for treating the dismissal order as a grant of summary judgment for the defendants-appellees, we could properly conclude that the Williams, Weidberg, and Air Travelers Association claims were effectively mooted at least as of the date October 16, 1975.

[3]While this opinion was in the final stages of preparation, counsel for the appellants brought to our attention that Roberts had filed a petition for rehearing in the D.C. Circuit in Moss II with the suggestion that the matter be reheard en banc. From some points of view, of course, the litigation may not be final until either there has been

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a denial of certiorari or consideration and decision by the Supreme Court following the granting of a petition for certiorari. For that reason we find it necessary to state that a preliminary draft of an opinion had been prepared in the present appeals prior to Moss II which reached the same result as did the opinion in that case and for substantially the same reasons. No purpose was seen in preparing the final draft of this opinion for repeating what Judge McGowan stated so effectively in Moss II.